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ABSTRACT

This document, one of a series on questions regarding humanistic education, contains a transcribed conversation about jurisprudence between William J. Bennett, a professor of the philosophy of law at Boston University, and William L. Bennett, a teacher of humanities and English at Browne & Nichols School. The conversation deals with ways in which law pervades everyday lives, the necessity for the proper study of law in schools and colleges, and attempts of over 100 state and local bar associations to see that an understanding of law, the legal process, and the legal system becomes a part of the curriculum. Both speakers maintain that the case method developed in law school is the most useful approach to law-related subjects because most legal cases involve "little" people, whose lives and problems quite closely resemble those of the students who will study them. A bibliographical note on case law materials to be used by teachers for introducing students to law is included. (Author/DB)

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WHY JUDGE?

A CONVERSATION ABOUT JURISPRUDENCE WITH
WILLIAM J. BENNETT CONDUCTED BY WILLIAM L. BENNETT

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The National Humanities Faculty Why Series

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<i>Why Pretend?</i>	Errol Hill and Peter Greer
<i>Why Draw?</i>	Donald L. Weismann and Joseph F. Wheeler

Foreword to the Series

This conversation bears a simple title: *Why Judge?* Yet taken together, this and the other conversations in this series illuminate one overriding question: What does it mean to be human?

Of course there are no final answers to that question, yet there are hard-won understandings and insights available to us from many sources, past and present. We all too often fail even to ask the question. Thus we ignore the help available and fail to become more human, more compassionate, more decent than we are.

At a time when our problems are so many—racism, poverty, pollution, crime, overpopulation, to name a few—we hold that all who care about education are compelled to re-examine what is taught and why. We believe that the problems will not be solved without getting at the larger question underneath them: What does it mean to be human?

The NHF WHY SERIES, then, reflects the concern of the National Humanities Faculty for the full range of humanistic questions. These questions involve but are not limited to the subjects in the curriculum that traditionally comprise the humanities: English, social studies, music, art, and the like. Indeed, they embrace the purpose of education itself.

In this series, the titles range from *Why Belong?* (human culture) and *Why Remember?* (history) to *Why Pretend?* (drama) and *Why Dream?* (myth). Each presents a transcribed conversation between two people—one an authority in the study or practice of a particular branch of the humanities, the other a person experienced in the hard realities of today's schools. In these informal yet searching dialogues, the conversationalists are rooting out fundamental questions and equally fundamental answers not often shared with students of any age. They are the vital but often unspoken assumptions of the delicate tapestry we call civilization.

These conversations are designed for the learner who inhabits us all—not only the student but the teacher, administrator, parent, and concerned layman. We hope they will offer new insights into our inescapable humanity.

A. D. Richardson, III
Director
National Humanities Faculty

THE NATIONAL HUMANITIES FACULTY WHY SERIES

WHY JUDGE?

a conversation about jurisprudence with

William J. Bennett



conducted by

William L. Bennett



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Introduction to the Conversation

The law pervades our lives, for better or worse. We are within its reach from the moment of our birth, through compulsory schooling, marriage, the purchase of a home or car, divorce, and death. Indeed even after death, the law continues to restrict our choices concerning disposition of our bodies and our property.

Law is an element of almost every major human problem including, to name a few, liberty, justice, authority, and work. Almost all the great issues of the day raise difficult questions of law: the usurpations and subversions of our political process by politicians in Washington, the depletion of our energy resources, the control of environmental pollution, the specter of crime and the interrelated problems of our criminal justice system.

The law is bound up with an infinity of infuriating details, as for example in the Internal Revenue Code. It is restricted by conventions that often seem quite remote from our own sense of fairness, as for example in the rules of evidence. It appears that our legal system favors the rich over the poor, the cunning over the honest, and the criminal over the victim. All these perceptions are, from time to time, painfully accurate.

We may agree with Justice Oliver Wendell Holmes that the law represents "a special branch of human knowledge . . . more immediately connected with all the higher interests of man than any other which deals with practical affairs." Or we may side with Dickens' Mr. Bumble, who said that "the law is a ass—a idiot." Nevertheless, along with death and taxes, we cannot avoid the law.

Why, then, has the study of law been limited in the past to lawyers? There is no simple answer to this question, particularly in light of America's extraordinary obsession with law and legal issues. The Declaration of Independence reads more like a statement of breach of contract than a revolutionary

manifesto. In the first half of the nineteenth century, Alexis de Tocqueville was struck by the central importance of lawyers and laws in America. In modern times, legal institutions, particularly the Supreme Court, have been the leading instruments of social change.

Perhaps law has attracted so little attention in our schools and colleges because it has been overprofessionalized. Encouraged by the legal profession, Americans believe that law is a highly specialized, even mystical calling, not dissimilar from the magic possessed only by the medicine men of some primitive cultures. Indeed, some primitive cultures may handle these problems better. The anthropologist Laura Nader has written: "It is astounding that in as legalistic a country as the United States, nowhere in the educational system does one get a working knowledge of the law as part of the general education. In fact after years of studying the Zapotec legal system of Oaxaca, Mexico, I would conclude that the single most important difference between the Zapotec legal system and the American system is that Zapotecs have access to and know how to use access to the legal system, and can afford to do so."

I am happy to report that the legal profession now understands that law is too important to be left to lawyers. Led by the American Bar Association, over one hundred state and local bar associations are working actively with nearby schools and colleges to see that an understanding of law, the legal process, and the legal system becomes a part of the curriculum. Lawyers are helping educators create courses that will develop intellectual skills, qualities of mind, and ethical attitudes necessary for responsible and effective participation in our legal and political systems.

At least since the time of Socrates, dialectical discussion has been considered an effective way to investigate issues of law. Messrs. Bennett and Bennett carry this tradition forward with great skill. William J. Bennett has degrees in both philosophy and law and appropriately enough teaches the philosophy of law at Boston University, where he is also Assistant to the President. William L. Bennett is in the English Department at Browne & Nichols School; he is a member of their humanities team, too, and thus concerned with the introduction of a broad range of material into the secondary school curriculum. I can think of no better introduction to the subject than their thoughtful and stimulating discussion.

Those who read it with a preconceived notion that the proper study of law in schools and colleges is a small-scale reproduction of professional legal training will be disappointed. As Dr. Bennett points out, law-related studies

in schools and colleges should be part of the interdisciplinary study of the great human issues of our times such as authority, justice, and citizenship, rather than a formal set of law courses such as contracts, torts, and trusts.

Nevertheless, the case-method developed in law school is a useful approach to law-related subjects. Legal cases are no more and no less than the descriptions of disputes between *real* people, and the attempts to resolve these disputes. Some cases involve important people such as the President of the United States. Some involve major issues. In *Brown v. Board of Education*, mentioned often in the following discussion, the Supreme Court changed American history by ruling that laws creating separate educational facilities for black people violated the equal protection guarantees in our Bill of Rights. However, most legal cases involve "little" people, whose lives and problems more closely resemble those of the students who will study them: a toaster that does not work, a used car that fails to perform as promised, an encounter with law enforcement officials, an issue involving student or teacher rights. A course of study in law can, at any grade level, include many "cases" discovered in actual day-to-day encounters in the classroom, the street, and the home, rather than in the published opinions of our courts. These everyday issues involving the relationships among people and between individuals and the state can often provide the best and most interesting material for dealing with the legal, ethical, and moral problems involved in resolving disputes.

A solid study of law will, of course, come repeatedly upon instances where our legal system fails to do justice, and others where it fails to provide any remedy, and still others where it intervenes in areas of life that should be left free. In the nineteenth century, Sir Henry Maine wrote that social needs and opinions are always more or less in advance of law. He stressed the importance of closing the gap in a society which was to survive and prosper. In our democracy, it is up to us, as citizens, to close the gap. As the discussion that follows indicates, we can do it if we are given the knowledge to see the gap and the intellectual skills to act responsibly.

Joel F. Henning

American Bar Association

WHY JUDGE?

WLB As I talk to my students, I sense a general unawareness of the law as part of their lives and at the same time a sort of tacit acceptance of its influence. Once a student asked me a pretty interesting question, whether laws are different in different cultures, and it suggests another question: Where did the law come from? Why all of a sudden are we together under a set body of codes?

BENNETT Well, it's not "all of a sudden" and it's not a set body of codes. Law is a heritage, and so it doesn't come from any *one* source at all. The law of the United States, of course, was built largely out of the English common law—eight hundred years of common law. We took the body of common law from England, deleted some things and added some things to it.

Now, it's also true, as an anthropologist would point out, that the law comes from, derives from, the customs and practices of the people themselves. You'll find, for example, that laws don't fare well that have a rationale totally foreign to the thinking or the practice of the people subject to these laws. Take issues in contract law as an example, issues of fair dealing. Human beings living together over time decide to have certain agreements vis-a-vis barter and exchange. *A* agrees to sell his sheep to *B* and *B* agrees to exchange some labor for these sheep, and if *B* doesn't follow through on his part of the agreement, it really affects their little society in a detrimental fashion. So when you have a rule in contracts that says you have to keep your agreements, it isn't as if this were the imposition of some foreign rationale upon the contracting parties. This rule is simply a kind of formulation of a reasonable means of dealing that men have agreed upon and practiced for some time.

I heard a story once that makes this point—by analogy it offers a good example of how law works. When they were making a park in Cambridge,

Massachusetts, the architects, instead of laying out the park and putting in the paths right away, decided to simply plant grass on the lot and let people walk across it. They watched the directions people took and then after a period of time they built the permanent paths on the paths the walkers had taken. I think this is a good analogy to the way much law evolves. You watch the way people behave, you see manifestations of their basic notions about dealing or trading or living, and your law formalizes these notions.

WLB You used the word "custom," and to me that implies that the law doesn't have to be written, that it's something that people feel is part of their heritage, yet so many of us think of the law as something written down, a concrete set of rules and regulations, rather than something that's just part of our culture.

BENNETT Well, it's often written down for the sake of precision in statutes and rules of procedure. Of course, much of the common law is written as well, though not in statute form; it's recorded in case law. But, again, if you had a body of statutes or a body of cases written down that expressed a sense of things totally foreign to the thinking of the people *subject to it*, this law wouldn't last very long. This would be true whether it was written down in ink or cast in tablets. I think law generally agrees with what you might call moral common sense, and I know that a set of laws that consistently violated the basic sense of what was right or wrong among the people who were subject to that law wouldn't last very long.

WLB That immediately reminds me of *Brown v. Board of Education*, the case deciding that separate facilities cannot be equal facilities. That seemed to me a case (and there are probably thousands of others) in which the law was interpreted so that it may even have contradicted the behavior of the particular society it came from. And your "path" analogy goes the other way. In *Brown v. Board of Education* the court laid down the cement and told the people to stay off the grass.

BENNETT Absolutely. Part of what we take in this country to be given and not subject to arbitrary alteration are those paths drawn by the language of the Constitution. We live in a constitutional republic, not a pure democracy, so, if you will, the broadest or widest paths were already drawn for us. But think here about how those paths were drawn.

If you look at the Bill of Rights and the history of the Bill of Rights, what you see are notions emerging in the history of Western man that came to be agreed upon as essential to a free society. At that time these paths were agreed upon, and then we said the paths were going to go in certain directions,

willy-nilly. Then, on that road, for little turns or twists within the path, we go back to the popular or consensus view. The states, you know, are laboratories for experimentation in the law, but these new pathways can't wander outside limits set by the federal Constitution.

WLB I'm interested in the idea of law being used to protect a free society, the concept that law adds structure to a free society. Can law inhibit a person's freedom, or should his freedom be "defined" in such a way that the law doesn't contradict it?

BENNETT Of course a bad law can inhibit an individual's freedom, and a good law may, and may appropriately, inhibit an individual's freedom for the sake of something else. The interpretation of the Constitution in this case—*Brown v. Board of Education*—may have the effect of impinging on the freedom of individuals as many individuals understand their freedom. They may believe they should be "free" to have segregated facilities where the law says they can't. But we say there are certain rules of the game, not very many, but there is a certain underpinning for the game, and without these rules this game can't be played as intended. One set of rules is the Constitution, and another rule is that we should obey the law and the Constitution as interpreted by the courts. Within those rules, within the operation of that game, there's a great deal of freedom. You can pretty much call the plays you want; that is, you can behave pretty much the way you want.

Now, the justification for the rules, of course, is that without those rules of the game, sooner or later there wouldn't be any freedom for the players at all; that is, if we didn't have these rules, sooner or later the game wouldn't be worth playing, or with anarchy and chaos, we would not have a game.

WLB You end up with chaos?

BENNETT Yes, and maybe worse. Maybe a society ordered on bad principles. I think there's a question as to whether a society is worth having when the kinds of basic freedoms that you're talking about, for example, those in the Bill of Rights, no longer exist, and when there's no reasonable expectation that your neighbor, your business partner, judge, and policeman will go by sensible rules.

WLB How do you see the Bill of Rights? Are you so sure that it is an expression of freedom rather than a limitation?

BENNETT I think, yes, the Bill of Rights, when it's active, when it has force, fosters freedom. But, of course, by so doing it necessarily restricts our freedom to interfere with the freedom of others. After all, if you tell me that I must move from where I live because of my skin pigmentation, that I cannot

worship the god I please, that I do not have the right to say what comes into my head, all because this enlarges your area of freedom, I am not impressed. And I *am* prepared to limit your "freedom" to carry weapons, drive at 80 in a 40 mph zone, and make intrusions on my privacy. Also, remember that granting freedom "to the people" or "reserving powers to the states" in a very real and important sense restricts the freedom of the federal government. Is that necessarily bad? The Founding Fathers didn't think so. I agree.

WLB Take a different kind of example, the student who really felt limited when he was told he had to go into the army because it was the law of the land. He's upset because the law interferes with his own freedom.

BENNETT Well, of course, freedom isn't defined by how someone feels about it. Possessing freedom isn't like having a toothache. Freedom may be there whether you feel it or not. To deal with this question you have to decide whether, for the purpose of maintaining a worthwhile society, it might be reasonable in some situations to ask the citizenry to take up arms for defense. Put it on that level and I don't see that it's inconsistent at all with the notion of a free society of free men. No society guarantees *absolute* freedom, whatever that is, and when we say the Bill of Rights enables freedom, we don't mean it enables every individual to do his own thing on every occasion. Obligations may obtain for free men. There's no contradiction there.

WLB I agree. But I'm still interested in what the options are for this person who's so obsessed with his own freedom. Does he have to go elsewhere? Are there other systems that may be perhaps better suited to his own definition of freedom?

BENNETT Well, one of the freedoms he has in this society is the freedom of egress. He can leave. I don't mean this harshly, as if to say "love it or leave it," which I have not said, but the freedom to expatriate is an important freedom that one has in this society that is missing in many. That's one option. Or he can refuse induction, if we're talking about that former and valuable institution called the draft, or refuse to abide by any of the other laws. Let's say he refuses to abide by traffic regulations, believing they constitute an encroachment upon his freedom to drive on both sides of the road. He may have to face some problems from the law because of that. But he has the options of leaving, adjusting, or staying and disobeying the rules of the road and taking the punishment that society thinks is appropriate.

If you're asking whether he'll get a better shot somewhere else, I have some doubts. If it's only this rule about traffic he objects to, he might consider emigrating to a horse-and-buggy society. There's no question that the state of

political freedom in our society is less than perfect, but our Constitution and the freedoms expressed in it are very real. Our Constitution has been used in a number of developing societies as a model statement of political freedom. I don't know where in the world he would have more freedom, unless perhaps on a desert island, but what would be the value of that freedom in an empty, lonely place?

WLB We talked before about the law emanating from custom. Are these customs universal in the sense that the same kinds of laws apply in just about every culture?

BENNETT That depends on your level of analysis. A basic concern with fairness can be found in every society. There's a marvelous story about a gentleman who went on safari in India with three porters. One of the porters was very energetic, did more than was expected, was always around to help and eager to aid whenever he could. The second porter just did his job, did what was expected, nothing more, nothing less. The third porter, as you might expect, would take a nap, fall behind, do whatever he could to get away from doing his job on every occasion that presented itself. Now these were three people with no formal education, and, so the story goes, with the most meager informal training. At the end of their journey, it came time for their payment; two pieces of gold was the expectation. The employer lined up the three men and put two pieces in front of each. Then he went to the third man and took one coin from his pile and put it on the pile of the first man. Well, two of the reactions are, I think, quite predictable. The first guy, of course, was elated and thought this was wonderful, and the third guy was upset. The interesting reaction was the second man's; like the first, he was very pleased. This is interesting. He didn't gain in any material sense, but the story suggests that satisfaction might have resulted from a basic concern with fairness. Moving from culture to culture one would want to distinguish the character of the barter, the things that are being traded, but in most cultures we witness a concern with fairness, with what you might call treating like cases alike.

WLB If we take from your story the idea that most men are fair, why is it then . . .

BENNETT I wouldn't want to take that conclusion from that story. The story suggests that one third are fair, one third more than fair, and one third less—and this is a very optimistic assessment.

WLB Well, then, that fairness is a crosscultural quality.

BENNETT No, rather that the appreciation of fairness exists in all cultures. Not that all men are fair, but one who is unfair will be recognized as

unfair to the rules of his society.

WLB But how general is fairness? I've heard you say one does not vote, in our legal system anyway, on whether something is right or not. If people have this sense of fairness, why is it that there's a reluctance to let the law be democratic and let judges be just the record keepers?

BENNETT From what I can see, people aren't born with a sense of fairness, but it is possible for people to become fair. Of course there are some fair-minded individuals in our society and in other societies. I'm not being cynical, I'm being realistic. All we have to do is look at the state of the world, and I think one could fairly draw the conclusion that men as a whole are not inclined to fairness; they're inclined to partiality. John Adams pointed out that although men are capable of reason, and that's fine, they're also capable of self-love. And the problem is that reason and self-love exist under the same skin; therefore, self-love occasionally informs reason and the result is predictable—self-interest operating against fairness. Collectively, such partiality leads to factions.

There's a more specific answer to your question, and that is, I think, the answer James Madison gave in referring to the tyranny of the majority. In cases affecting the individual, it's not only possible but in most cases likely that he will not be impartial, that he will not be fair, but will tend to regard his own interests as meriting more attention than the interests of other people, and this is why we say a man shall not be a judge in his own case. Now, Madison feared a majority that might regard its interests in a way that would result in persecution of a minority. The past was a lesson on this. What Madison was trying to stress, for the well-being of this republic, was that the minority had to be protected, and that's why you had these hard guidelines, these minority rights.

You see, the constitutional provisions we're talking about in the Bill of Rights simply can't be voted away by a majority. Although most of our laws are established by the majority's will, if these fundamental liberties could have been voted out of existence Madison would have had to judge this experiment (he regarded the American republic as an experiment) as a failure for not advancing beyond the scheme of many dictatorships and many tyrannies, where a majority held absolute power over a minority. Law can be more protective than the mere whim of the majority.

WLB This suggests that there's a stable, perhaps absolute, quality to our laws. One of the things that bothers me is the responsiveness of the law to change. It seems to me that there are many historical situations in which we

can see that perhaps the country just wasn't ready for a certain change in the law, for example, in 1954 with the *Brown* decision. The question I want to ask is this: Is the law responsive to the changes in the society, and conversely, what happens when the law is ahead of the societal attitudes?

BENNETT I don't understand your disjunction. You have to distinguish that rather permanent expression of rights, freedoms, and obligations that you find in the Bill of Rights from the ability of, let's say, nine men on the Supreme Court to appreciate the application of a constitutional principle at a particular time. Insight into the best application of a principle is not something we always have. Although men waver where words don't, men are needed to give the words vital application.

Yes, then there is some permanence guaranteed here by the words, which do not change. But, of course, there's an intrusion into that permanence by the fact that it's human beings who administer the law. These principles are not self-evident so it's not obvious what their application will be in every context. When we see this, we see that what we have is a kind of mixture of both permanent rules and principles and the human ability to commodiously interpret rules and principles in a particular time and place. This interpretation of principle is work done by fallible men who live in time. This all reminds me of that image of Justice Black carrying that copy of the Constitution in his pocket.

WLB Is it important that their interpretations be operative, effective? Clearly, *Brown* was inoperative in 1954; yet they made that decision. But what came of it concretely?

BENNETT It all depends on what you mean by operative. If you mean by operative that it became law, yes. Operative in terms of having an obvious and immediate effect, yes and no. Indeed, following the *Brown v. Board of Education* decision, the language of the Court about the integration of facilities taking place with all deliberate speed showed a recognition by the Court that it knew when it made this decision that it would not change the shape of things immediately, but that it would be to this decision that one could go for final appeal or justification as concrete change was sought.

WLB When I used the word "operative" I meant applicable, a regulation which may actually be put into operation.

BENNETT Well, again, what does it mean—to put into operation? If we put a hard enough test to that—that is, if we say don't pass any laws or don't interpret any constitutional protections to a particular situation unless they can be fully operative, say a hundred percent—then we might just as well do away

with the Constitution and all law and all human institutions because, if we wanted to do a factual analysis on adherence to the Bill of Rights, we might find that in many cases the spirit and letter of the Bill of Rights are not operative. I think one says about the Constitution what one says about all law. What it seeks is a hundred percent, but what we can live with and tolerate is a rough approximation of justice.

Has more been done to aid the plight of minority groups in this country through the elimination of certain segregated facilities since *Brown v. Board of Education*? Yes, I think a great deal more has been done, and much in the name of this case, so it has become operative in that sense. And it set other things in motion. Is it operative in a way that we'd like to see it operative? No. It hasn't achieved the kind of full implementation that we'd like. Human nature and intransigence is not altered, even by a 9-0 decision of the Supreme Court.

WLB Doesn't this risk the danger of hypocrisy, especially from the point of view of a high school student? I'm thinking of the *Miranda* case, where the Court said you must warn an arrested man that he can remain silent, has the right to counsel, etc. The police are given specific instructions about how to arrest people, and the police complain about the time-consuming, elaborate nature of the procedure. A student assumes that *Miranda* protects him, but when he's arrested, all of a sudden he's treated in an entirely different way from what that case says, so his faith in the law, in the courts, may be undermined by the discrepancy between the law and its enforcement.

BENNETT Okay. What you raise there, among other things, is really the difficult question of the timing of decisions. If you're on the Court and you have before you a piece of legislation or a case where you think your decision is going to necessarily go against the grain of the thinking at the time, should that be an important consideration for your decision? Members of the Supreme Court have had different views about this. One argument is this: Don't we really weaken our position when we come out with a decision which is not popular, and don't we in this way really gradually erode the authority and the effectiveness of the Court? The other side may say, of course, we've got to do "what's right," be it something that is popular or not or whether it will immediately be effective or not. I don't know. You have to see merit on both sides of this argument.

It seems to me the answer lies in recognizing that the influence of the Court will erode if the ideals the Court is expressing in its decisions are so foreign to the thinking of the people who will have to carry them out that the possibility

of implementation is really nil. At the same time, I think one should argue that the Court on some occasions does and should function as a teacher; that is, it has itself been the progenitor of an idea which has captured the minds of the people. If one looks at the Court's decisions in that way, it provides another source for confidence and courage. Look at the Supreme Court as an instrument of social reform—look at the issues of judicial review, commerce, child labor. Here the Court helped change the thinking of a nation and its people.

By the way, your student friend should get a good lawyer.

WLB In either case, we may be in the first situation talking about the tyranny of the majority, at least de facto tyranny, if the majority of the people think of something as inoperative. And in the other case, we have nine old men saying this is the way it should be. How does the average citizen respond to that? Which is he going to be more comfortable with, the fact that most people don't agree with the law so it's not really effective, or the fact that nine people say this is the way it should be?

BENNETT Distinguish between the long run and the short run. I think most people in this society are still pleased that there is a Supreme Court. There are, of course, as you know, certain checks on the Supreme Court—the President's power to appoint members, politics, and the influence of popular thinking, for example. In the long run, when people stop to think about having the Court, whether or not they disagree with a particular decision, I think most people will decide they would prefer to have one. Even with the temporizing we talked about, it does supply a needed permanence in the system which most people support.

WLB When I was talking with my students about doing this interview, the first comment they made invariably was "The law? What do you mean the law?" They really felt as if somehow they were isolated from the law. Do you, as a professor, see the law as having a daily influence in any real conscious way? How conscious are you of the law?

BENNETT In terms of the daily operations of the law, I guess I'm not much more conscious of it than anybody else. The fact that I teach law makes me conscious of it professionally, but in terms of its day-to-day operations I'm not.

And that suggests to me, by the way, that most people can say honestly that, by and large, the law doesn't interfere with their freedom, that for the most part they can pretty much do what they want within the rules of the game. And this, of course, is perfectly appropriate. The law should be a kind

of hidden substructure, a kind of hidden undergirding of society. It shouldn't be something dominant in our lives that we notice and pay attention to every day. As Paul Freund has said, law should impose some measure of order on the disorder of experience without stifling life's diversity. The law is not a deity, and we shouldn't worship it.

Really, law is there to enable human beings to do the things they want to do, and law only comes into the picture when things break down, when there's frustration, when there's a collision, a conflict. I mean collision literally, when a car runs into another car, for example, or figuratively, when a husband and wife collide to such an extent that they can no longer make a marriage go and commence divorce proceedings, or when two contracting parties come into conflict in such a way that they can't settle their differences privately. Then you may have recourse to law. Law is a means of conflict resolution.

When you do have recourse to law, often I think you've got to admit a kind of failure, revealing recognition that the private working out of things didn't do the job. This is the way much law should be understood, it seems to me: it's in the background, and one turns to it only out of necessity. In a general sense, it seems to me, law is a system of institutional settlement for the resolution of conflicts.

WLB Should there be more general awareness of the body of the law? Do you think people break laws out of ignorance?

BENNETT No, not very often, I think. But I do think there should be more understanding of the law because it plays such an important part in the establishment of what we regard to be the virtues of a free society; people should have a better appreciation of the law.

Not too long ago, some researchers said they tested people's belief in the Bill of Rights. (I don't know whether this was valid testing or not.) A random sampling of people were given fact situations which corresponded to recent Supreme Court cases. The people were asked to comment on whether *A* should be allowed to speak, or whether *B* should be allowed to wear this armband in school, and so on. A majority of people said no in cases where the Supreme Court had said yes. What they said, in effect, according to the people giving the test, was that many citizens don't believe in the Bill of Rights as interpreted by the Court in these situations.

If the testing is reliable and the data are sound this suggests to me that we need education in the law. In a society that advertises the value and goodness of the precepts and protections of law, people should know what those precepts are.

WLB Can you think of an example of a law which the vast majority of people have disapproved of for a very long period of time? It seems to me that your objection to democratic law is that there would be a series of changes, one whimsy after another. Are there certain statutes that might be in general disfavor for a century?

BENNETT Well, perhaps not a century, but I think immediately of prohibition. Of course, there you had a problem of enforcement. Wasn't it Ring Lardner who said, speaking about this law, that prohibition was better than no liquor at all? The consensus was that this law was absurd, and many people just went behind closed doors and broke it. Speed limits are another example, a better one because the law there is clearly sensible. I think a lot of people totally disregard speed limits. And yet if you asked them whether they believed in them, they'd say they did. So there certainly are examples of laws which simply don't work in the way they were intended.

I think though that one would want to distinguish something like prohibition from, say, something like laws prohibiting certain kinds of police searches. It might be that the majority of the people disagreed with the spirit and direction of both laws, but in the latter situation you wouldn't want to change the law simply on that basis. You may say let's give on prohibition, but we cannot give on the search matter, and the reasons you'd do that, it seems to me, have to do with the relative moral seriousness of the one in comparison to the other.

WLB Would education be an answer then?

BENNETT Well, education would certainly be an answer with regard to something like knowledge about recent civil rights legislation. I think this is done every day in schools all over this country. In some places I've observed the great difference between the younger generation, the students I've taught, and many of their parents, in terms of their reading of this situation. And human nature has not changed. What has happened is that many young people by way of reading and by way of the educative influence of some of the news shows and an occasional big production of a national television network to which they're exposed really have been educated out of a very partial and intense kind of prejudice.

I mention TV because I think it can be so important. I think TV is really destructive of value in many ways as well, but in this situation its beneficial aspects just can't be denied. These students watched Martin Luther King on TV, saw his peaceful demonstrations, were witness to his eloquence, saw him being clubbed, and so on. They had more than word-of-mouth and something that could be changed each time the story was reported; they could see it with

their own eyes. And this degree of exposure had something to do with the change of attitude.

WLB And they've been in classrooms with blacks, too, which their parents may not have had an opportunity to be.

I'd like to go on to the power of enforcement of the law. Our society has ended up with a body of statutes and says it wants the people to abide by them; when they don't, the society, through enforcement of its laws, throws them in jail or fines them or in some manner reprimands them. Is there an awareness of these penalties? And do they really influence behavior?

BENNETT Well, we've got to step back a bit and recognize the basic rationale for all this. Justice Holmes says that the idea of punishment like the idea of law is really very simple: If you want to live, there are certain things you have to do; you have to eat, you have to clothe yourself, you have to get out of the cold, and so on. He says if you want to live among men, you have to live according to the rules they've set up for the society in which you live; and, if you don't, Holmes says, they'll put the screws to you. That was true in the fifth century B.C., the thirteenth century, and it's true today. Why put the screws to men? What effect does the punishment have? Well, this is really a very complex issue.

I think that penalties have little if any educative influence on the person being punished. The evidence today suggests in fact that people learn to be more criminal when they're put in jail for the violation of a criminal statute. The effect here is not positive but negative. Talking about fines—for traffic violations, for example—I don't know if you'd call them educative, but I do think they operate as an effective deterrent. People do observe within certain limits some proximity to the speed limit, perhaps out of concern for their passengers, but also because they don't want to get a ticket.

WLB But when a person goes to jail, his family, other people around him, may respond, "Look what happened to him. I'd better not do the same thing."

BENNETT Is that education? Didn't the people know before what has now only become poignant? Perhaps we've induced a certain amount of fear in those around him. At the same time, the people around him (his friends and family) may feel a great deal of bitterness toward the society or the system or the institution that may have failed him and contributed to his sad lot. I don't know if they've been educated.

WLB The law can't avoid that kind of personal bitterness.

BENNETT The question really is whether the kind of personal bitterness engendered in the person who's put in jail and in his family is a better

alternative than what we'd have if we didn't put him in jail and faced bitterness from another source.

Interestingly—and revealing something that I've found, students quite ignorant of when they talk about the law and they talk about punishment—I've heard the phrase “lex talionis,” the law of retaliation, bandied about to condemn the law, to talk about the law as a hard instrument of justice. You know, the idea of an eye for an eye and a tooth for a tooth—if an individual has done something wrong the law will exact something from him—is used as evidence of the harshness of the law.

But when lex talionis became operative, it was a signal mark of progress. In the old days, I mean the really old days, if I had killed you, your family would avenge your death, not simply by killing me, but by killing everyone to whom I was related by blood because, of course, the bad blood was partly responsible, and the appropriate thing was to rid the world of this blood. So when the law came along that said if *A* kills *B*, we will take *A*'s life, this was a piece of progressive legislation. It set further limits to vengeance.

WLB I sense a paradox. You talked before about law emanating from custom. And now we're talking about law in impersonal terms. When we talk about the law and mean the police, we divide into two factions, the prosecutors and the citizens.

BENNETT I don't think this is in violation of custom. It may be perceived as a we/they situation by those in the situation. But as for society and the individuals in society, if you don't think they want vengeance and seek revenge for particular acts or crimes against society, then I think you're wrong. Some measure of revenge is consistent with human character and it's quite consistent with the customs of people. If anything, I would say that history argues that a system of restrained vengeance is evidence of enlightenment.

WLB Does the law have a right to infringe on personal privacy?

BENNETT You've already given me the answer when you ask the question in that way. No, it doesn't have that right usually. But what constitutes my “personal” privacy?

WLB It seems to me the state can always take the tack of saying that, because at some point along the line the public is going to be affected, we must intervene in a person's behavior now. It seems to me obscenity cases are like this.

BENNETT Yes, that line of argument is available to the state. Whether that line of argument always works is something else again. For the last

twenty or thirty years, a balancing test has been operating in some right-to-privacy cases. That is, what you do is look at the possible harm to other people or to the public engendered by allowing an act to take place and the likelihood of that harm's occurring and balance them against the harm of intrusion into the privacy of the individual, considering also whether the intrusion is into an area which we take to be "sacrosanct." One way of understanding what we take to be sacrosanct is by referring to the Bill of Rights. We're very wary, and we should be very wary, of intrusions into activities like free speech and free worship. When we get into activities like shooting up with heroin, where the possibilities of demonstrable harm to other people are obvious, then the balance shifts.

WLB There's another issue, too—verifiability. In obscenity cases, the state has a very hard time establishing that the person's behavior is actually obscene, and a new dimension is added to the issue.

Do penalties get into the balancing act? I sense that many people in this country don't see the law as being very consistent, and in many cases it even seems very whimsical, depending on the resources of the person, often his physical appearance, perhaps his race. Doesn't this undermine the entire effectiveness of the legal system? Or aren't students justified in viewing the law in this way?

BENNETT Sure they are. But I think one wants to distinguish what you might call the statements of justice or the statements of law from the administration of law.

Let me try a simple answer to your question. Then I'll go into more detail if you like. If in the books there were a statute saying that black people shall be treated differently from white people with regard to penalties and punishment for crimes, I don't think such a law would last very long without being challenged and overthrown. But that's a different thing from what we see in the administration of justice, the kind of partiality that's going to appear in it. Again, application will fall far behind exemplary principle. But, given the choices, I'll take my refuge in the law even so administered rather than do without it, and I'll say that these statements of law constitute for me places of refuge, places where I can go, where I can hide, where I can use the law to resist that partiality which has already been manifested. Law, even imperfectly administered, is yet preferable to unbridled force and hatred unrestrained by institutions and rules. And I'll appeal.

WLB It seems to me you're again suggesting that law may be somehow separate from mankind.

BENNETT In a way, it is. In a way, I believe it's a refuge for men from men. Of course, it's an imperfect refuge because, wherever one goes, wherever one seeks it out, one is going to find men administering it. We do have a history—and not only a history but abundant examples—of people misusing the law.

WLB Is there hope that administration will be better?

BENNETT Certainly. And part of the reason for this hope is the maturation of the same generation of students that raises this question. Perhaps if this generation decides to go into law and the administration-of-law business, the future will be better.

In a general sense, the answer is simple. Madison said you can frame the best laws you want but without virtue in the people they'll be of no effect. Now, I don't say that the American people are absolutely without virtue, nor do I say that the law is absolutely virtuous either. I think it's imperfect and indeed can and should be much better in statement and administration. Right now I think our most important need in terms of the law is not new constitutional protections or provisions and, in terms of priority, not even the change of many statutes. What is needed more are really fair-minded and dedicated men and women who will enter the profession and administer what seems to me to be a reasonably fair system of rules in maximally fair ways.

But now I want to ask a question back to those students who questioned the consistency of the law. Are they going to go to law school, and if they go to law school what are they going to do? Are they going to get into the administration of justice or are they going to change their minds and their values? How many of them who are concerned about the administration of justice and are not going to law school would consider being policemen? This, of course, is the place where the law impinges upon citizens in the most direct way. How many of these students are willing to go out after college and get jobs as policemen and volunteer for service in the ghetto?

WLB Do you see the recognition of this hypocrisy as a good sign?

BENNETT I do. There's nothing wrong with hypocrisy in itself, if we only expressed what we were in fact, we wouldn't have much to aspire to. Hypocrisy is one way for a man to recognize how far away he is from what he claims he ought to be. What's that line about hypocrisy being, "the homage vice pays to virtue"?

WLB Then I sense also that we're getting back to the idea about democracy. If this current generation senses the hypocrisy in the law's administration and actually tries to change it, then the law somehow will have responded to a new

generation, and responded in a democratic way to the feelings of the people. BENNETT No, I don't think the general substance of the law will change, but the administration of the law, the processes of the law, as you suggest, would be changed by an influx of fair-minded people who could remain fair-minded throughout their careers. If you mean does the law in itself in this way have a kind of power to transform human beings, no, it doesn't. It certainly doesn't.

I think here one wants to distinguish between the authority of law and the power of law. Let's take the Supreme Court again. As you said before, it's nine old men. There's not a whole lot of power there, but there's a great deal of authority. But without the willingness on the part of individuals to go along with that authority, we may have little in the way of concrete effect. This is one reason why the Supreme Court, members of the Supreme Court, are reluctant on so many occasions (and people don't understand why they're reluctant) to take upon themselves those cases which people think they really ought to take.

Justice Warren said not long ago that people have not to remember that it's basically through the political process that change is going to be brought about, because one way to destroy something like the Supreme Court is to lean on it to be the agent of every piece of enlightened progress. It simply can't bear that burden; it's simply not strong enough to do that. The Supreme Court functions as a court of last resort, and this idea of last resort should be taken seriously. If we believe that we want to have a free society and free institutions, our first resort has got to be to the political process and to the citizenry.

Americans would like to think of the Court as something less fragile than it really is. There's a great story told by one of Justice Warren's law clerks. One morning early on a day the Court was in session, Justice Warren was approaching the building and ran into his law clerk. They were standing there chatting when a group of tourists came up behind them, taking pictures. A gentleman in the group went up and tapped the law clerk on the arm, pointed to Warren, and said, "Would you ask that old man to move? I want to take a picture of the Supreme Court." Americans would like to believe there's a kind of immutable strength and power there, a kind of transcendent and eternal mind there. But such a thing really doesn't exist. It's nine men trying to figure out as best they can what certain words mean and how they apply to certain situations. There is tradition, of course, and there is history and precedent and the possibility of good judgment, but there are no answers in

the sky or infallible tablets in the judges' chambers.

WLB I sense a real cynicism in you about human nature, and I don't know whether I agree. Law comes from custom, and I agree with you about this idea of fairness in people, although I also recognize self-interest in every one of us. But I'm wondering whether my behavior has been modified at all by the law and whether it would be different if there weren't any rigid rules, if there weren't any police.

BENNETT That's a speculation I think we all indulge in. Part of the experiment is impossible, because you and I and anybody listening to us can't really start anew, start afresh, in a society without laws, to really test whether we need laws in a society, because we already have been exposed to them to such a degree that perhaps we've in part been influenced in our thinking about what's right and wrong by what we know about law. And our society has been so influenced and in turn its influences upon us have been so direct that we really wouldn't have a fresh experiment in the way we'd like to have.

What would a society be without law? I don't know. If it were a society of men and women who'd been educated in law, who'd lived in a society of law, I expect the shape of things would sooner or later be not very different from that of the place they had left. You know, this is something that one can learn from history. I think a reasonable way to define a revolution is as an attempt to overthrow the existing legal order. If you examine most revolutions, you find that a few years after the revolution takes place the old order begins to re-emerge. The Russian revolutionaries wanted to overthrow all the laws of czarist Russia, but they found that in order to operate, in order to have the "new" society function, they had to take the largest parts of that law and make them operative again. I think most revolutions prove that case.

Whether we would want a society without any laws at all has to be asked in terms of whether it's possible for men to operate well without them. For the most part, I think the evidence suggests not. You can do thought experiments and take situations in our society or in other societies where law effectively breaks down, where you've got, say, a riot situation, the police standing outside an area forming a kind of barrier, but inside there are no police and in there the laws are not operative—and decide whether you particularly like that situation.

WLB At the same time, you can take the example of a commune where some kind of natural law is the order rather than any specific code.

BENNETT I have a lot of questions about such communes. First of all, if it's a commune, let's say, of twelve people, then you're talking about a

society which probably can operate in one sense pretty effectively without formal law. That is, it's possible for a time, although not likely. I think, in a group of twelve for enough respect and enough human love and enough affection to exist among the members of the group so that the kinds of sanctions that operate (and sanctions do operate) all operate internally. But you're not dealing here with a situation in which you don't have law. You're dealing with a situation in which you don't have written law.

Look at the association one has with one's closest friends. Are these associations without law? Well, in the literal sense of law, yes. But are there not rules? Of course there are rules. There are complex rules, and difficult rules. Certain things are not done. Friends don't do certain things to their friends. Internal sanctions operate. We don't have to write them down because membership in the group is desired so much, so avidly, that the internal sanctions are sufficient here to hold people in check. But that's a society of twelve, not a society of 200,000,000, mostly strangers.

But I have other questions about that commune. I want to know, for example, if it really is a separate society. I mean, I want to make very sure that nobody in the commune is getting a check every other month from somebody who slogs around in that other, law-bound society. I want to know what degree of dependence operates in this group upon the larger society which they've supposedly given up. Have they given up everything they learned in those schools? Have they given up the nurture that their parents have given them? They'd have to do this before you could confidently say here's a society operating without law. If I can show you a hundred ways in which they're dependent on that larger society that needs law, then their "virtue" is parasitic and their dependence on law is obvious.

Is this society then without law when perhaps part of the success of this small society is due to the fact that people were able to grow up and live in a society of law, which enabled them enough leisure, enough time for education, and enough time for the development of their affective capacities so they can go out and have a successful commune? Take twelve people who are civilized to such a degree that they've all been educated, they've all been raised in a religious tradition, or in the effects of a religious tradition, that teaches love and piety and respect for other people, and you haven't talked about a separate society at all.

WLB What would drive them outside that society?

BENNETT I can understand that instinct very well. There are lots of pains as well as pleasures associated with living in Boston. I think it would be

groovy to be up in the woods in the Vermont hills for a while with a group of people, growing our own food. It would be a very pleasant existence in some ways.

WLB You don't think it has anything to do with the way the law is being administered? Right now, I feel there's a strong malaise about the law. Somehow, people don't see it as something that's improving, something to be respected, but rather they feel that it's somehow let individuals down by the way it's been administered.

BENNETT I think that's partly because of people's expectations. When you've got a society like ours, where there's a tradition of meeting expectations, and people begin to think more about things that they'd like, their expectation of law becomes greater.

But people don't acknowledge the real progress that's been made. Sometimes I think talking about law should really be preceded by talking about history, because when we recognize that things like laws against child labor weren't passed until 1940, that we didn't have effective open-housing legislation and we didn't have certain rights like the right to an attorney for those accused of criminal activities until the 1960's, one recognizes that it's only really quite recently that many important innovations have taken place. Again, where was that Garden of Eden from which we fell? Where was that society of law in which people had greater degrees of freedom than people have now?

WLB Don't you think it's possible, too, that the exposure to increased communications that we've mentioned before has something to do with this discontent? Previously people weren't so aware of the inequality of the law and the unfairness of the law because they didn't know what was happening seventy-five miles away, much less across the continent. Now we're given the opportunity to see, and to respond to, so much more.

BENNETT Not only the opportunity, but the time, the leisure. When you've got a society in which a large part of the people have the time and leisure to engage in the very important activity of worrying about the rights of other people, this is real progress, and this is civilization. When you've moved to a society where an individual doesn't have to spend all of his life worrying about his own survival but can, as he begins to think about other people, worry about their survival and about the protection of their rights, you know, if you know history, that this is indeed a great moment in the human experiment.

WLB You've sort of punctured my balloon. I came here today with all these

uneasy feelings about the law. Now it seems to me they've all been transferred to the question of how the law has been administered. Yet I still have this feeling that there are bad laws.

BENNETT Of course there are. There are some laws that shouldn't be on the books. There are a number of laws that are on the books that aren't enforced—the prohibition-type law, still on the books but not enforced. And some on the books and enforced that we'd like to do away with. It really comes down to looking at a law and asking whether it makes sense or not.

I'd like to get back to the point, reiterating Madison's notion that without virtue in the people, and this has to do with the administrators of the law as well as with the citizenry, it really makes little difference how virtuous the laws are. Justice Frankfurter said that civil liberties draw at best only limited strength from constitutional guarantees. He was after the same point: a preoccupation with the legalities, as opposed to daily operations of political life, is the wrong kind of preoccupation for the citizen. He said, "Preoccupation with the constitutionality of statutes rather than with their wisdom is preoccupation with a false value." No society can survive when the people in that society are not themselves respectful of the kinds of values the law wants to affirm.

I don't want to hide behind a position which says there's really no argument with the law and ignores the operation of the law, the legal process. It's the day-to-day operation of laws against slavery or laws against child labor or laws protecting labor unions which in fact gives us reason to believe in the legal system and process. So when we're making the case for law, we don't just say these are beautiful words; we say some of these are beautiful words and I express profound moral insight, *and* they're in effect. Then if one wants to praise the law for its vitality where appropriate, one should be able to condemn the law when it malfunctions. I'm simply arguing that reform of the legal process, that is, changing how the administration takes place, is a hard business which really gets back to human beings and their commitments and what they're prepared to do. Reform is possible. But obviously, simply getting turned off to the law and to its administration won't do the job.

Let me use a friend of mine as an example. When he got out of law school, he worked as a poverty lawyer in Texas. He had a ridiculously difficult job, an impossible job. He had something like 1,400 clients for whom he was responsible as a lawyer. Well, the degree of frustration he felt in trying to do justice for 1,400 clients was, of course, enormous, but he plugged away and plugged away, spending a lot of his time working on welfare statutes and their application in the state of Texas. Now, four years later, he's going back to

Texas to argue a case before the district court in regard to an important piece of welfare legislation. He thinks he's going to win the case, and if he wins that case the effects in terms of the operation of the welfare system in Texas will be considerable. But it was really his involvement in the process in a very direct way, in a way that demanded a lot of time and energy and attention from him and enabled him to get to a position where he knew his cases, knew how these laws "lived," that enabled him to be in a position where he could bring about some sort of reform. The good laws still require committed men for their vitality, but some bad laws survive by themselves.

WLB Is justice a viable goal?

BENNETT I don't think we're condemned to the status quo. But I don't see the full approximation of justice as a real possibility either. There, I think, you're talking about something that would require the transformation of human nature. There will always be partiality as long as men inhabit the face of the earth. The question is what response we can make to that partiality, what kinds of safeguards we can build in so that that partiality takes the smallest toll.

Justice is a viable goal and the only goal of a legal system but the desirability of the goal and the value of our efforts toward it don't depend on our ability to get there. You know, turn it around, it's like the guy who says there will always be poverty; therefore, why should we work toward the elimination of poverty? Well, there may always be economic differences between individuals, but the real question is: Can you eliminate truly serious, truly invidious kinds of poverty in which people don't have enough to eat and die or suffer from lack of proper nutrition? Yes, that's possible, and its approximation is very possible.

WLB It seems as long as we have this goal and the reality of the situation is such that it often contradicts the goal, the individual, especially the young student, gives up.

BENNETT That's if you set up a kind of either/or situation: either we have it all, or nothing. Anything less is not worthwhile.

WLB No. He sees the contradiction; he sees that people are going in the direction of the goal, but because of human nature or because it's so lofty, the goal may never be reached. And that leads him to a helplessness, a feeling of futility. What happens to that one individual who really wants to have an impact? Talk about your friend, the welfare lawyer.

BENNETT But, you see, he doesn't set himself the task of reforming the whole legal system. He sets himself the task of reforming a little piece of it.

Don't set your goals so high that failure is inevitable. Don't build defeat into your plan. If our students get frustrated because they can't do the whole thing, then the problem isn't with law and how we're talking about law or how they're understanding it; the problem is either with us or with the parents of these students in leading them to believe that somehow life is without such frustrations.

An eighteen-year-old simply should not believe that perfect happiness and perfect contentedness and perfect love and perfect justice are really very likely options for him or for anyone else in this life. And if he does believe that, then the problem is serious, and it is with his education. It doesn't have to do with the law; it has to do with his degree of exposure to and appreciation of experience. And I agree that most of our students are not sufficiently exposed to life to enable them to see the problems with those positions.

WLB In a way, though, this generation of students is really pretty apathetic; they may give lip service to all these things, but a lot of the time they're more concerned with music, inebriation, and a variety of other sensory pleasures. I'm wondering how sincere all their discussion about injustice is.

BENNETT I wonder about it, too, but I know that one point certainly is true: If you define a system in such a way that all the individual ever hears about is its injustice, his natural response will be to turn away from it. If you don't suggest to him that there are possibilities for change, for reform, that there are cases, real cases, that have been decided according to the best and noblest of principles, how will he find out? Take a student through something like, say, the history of labor unions in this country, and study the history of the law of libel and see the history of these particular protections and how much blood was shed over them. Let him see how one man, say Edward Coke back in the seventeenth century, was able through his career to bring about some very important changes of great significance. This might turn a student on again or at least qualify his tendency to turn off immediately to the possibilities of reform. Create ambivalence. If you paint the picture in such a way that it's all dark, it's all dismal, then I'm with the students. I'm going to Vermont. Fast.

WLB But is the answer the New York City policeman, a graduate of Amherst, who travels around to college campuses recruiting graduating seniors for the City Police Force?

BENNETT That may be one answer, sure. Why not? I think another answer may be having students read some important cases in the law. I have my freshmen (and I don't think they're that much different from high school

seniors) read some cases which they really marvel at. You know: "My gosh, here was this guy on the Supreme Court who really still preserved his decency and humanity, this Justice Frankfurter. There was this case where these police had broken into a guy's house and he'd swallowed these pills and the police pumped the pills out. This case got to the Supreme Court, and Justice Frankfurter said, 'No, that's a violation of the decencies of civilized conduct, that just won't do. We just have to turn this case around, because we're not going to have the police doing that sort of thing.' " Here was a man, this Frankfurter, who had been a very successful lawyer, had been "establishment" in all the ways one can be "establishment," had achieved a position of influence in the country, and who still preserved an enormous degree of morality of soul and morality of mind. This is something that gives people faith. You can see it with Brandeis; you can see it with Holmes; there are very, very great men in the American legal tradition. Greatness is still possible. Students can still believe in it.

WLB Where does law end and morality take over?

BENNETT Well, I don't think one can draw a sharp line and say here's law on this side and morality on the other side. First of all, I see law as an expression of morality. I don't see any reason to say that the law of contracts, which says you ought to tell the truth and you must carry through on your promises, is not the expression of a kind of morality. Or to take a stand on reckless driving, to take a stand on cheating on your income tax, is to take a stand which has moral implications through and through, so that talking about the adjustment of relations of individuals in a society is talking about the morality of that society.

What people usually mean by this question about law and morals (I don't know if it's what you mean) is private morality, that area of privacy. What is that area of privacy into which the law shall not intrude?

WLB Actually I'm initially reminded of the *Crito* and of Martin Luther King's *Letter from a Birmingham Jail*. Both Plato and King said that we have to obey the laws of the land, our social authority. If we really believe in the society itself, we cannot go against the edicts of that society.

BENNETT No, that's not what they said. Neither of those books, the *Crito* or *Letter from a Birmingham Jail*, should be read as if it were saying you should never disobey the law.

WLB But both texts seem to offer similar interpretations of the idea of civil disobedience. When does one's morality say you have to disobey that law? Let's go back to the student who was being drafted but whose own morality

(maybe this is what you mean by private morality) said, "Listen, my conscience won't allow me to participate in the army."

BENNETT Well, I am troubled by the example. The tradition of civil disobedience is a fuller and yet more exact notion than the notion that private morality occasionally leads one to disobey a law. First of all, the issue must be serious, must be one which is not trivial. If somebody sits in the privacy of his room and smokes some marijuana, I don't think we should call this act civil disobedience; this is something different, simply a kind of private disobedience.

But civil disobedience, for Martin Luther King, is when somebody takes an issue that is a public issue of some gravity and is concerned to express his opposition to it in a public way so that others may see his opposition to it, and expresses this opposition so as to appeal to the conscience of the community to change its posture toward a particular law or ordinance, often in appeal to a higher law of the land.

WLB Wouldn't you add to that a willingness to accept the penalties for this?

BENNETT Yes, I would. And there are two more conditions, it seems to me. First one considers the alternatives very carefully—whether this is the wisest way to achieve the end. There's a kind of restraint here. One doesn't engage in civil disobedience on every occasion because it then loses its force. Second, there has to be a recognition that ultimately one is a member of society and that the final judgment of society is to be accepted. It's a testing of one rule against another rule, but the rules are always rules within society. It's an appeal to the community, but it's also a recognition that the community does have jurisdiction over the individual.

As Martin Luther King said in *Letter from a Birmingham Jail*, one doesn't take this stand as an individual apart from society but as a member of society who is reminding society of another, higher moral good by means of which this offensive rule is to be measured. It's an appeal to a value that society has already affirmed. And as John Silber of Boston University says, the successful civil disobedient is parasitic upon the virtue of the society whose law he openly disavows. King disobeys a particular ordinance in Alabama, he says, not simply because it's unchristian but because it's unconstitutional and because the United States is supposed to be on the line for equal rights. What he does by his act here is to ask the community to examine this ordinance in view of the protections of the Constitution, which should vitiate the operation of this particular ordinance. The Constitution is the higher law.

And, just to say something else about this point of accepting punishment,

King willingly goes to jail for violation of this ordinance—not only willingly but triumphantly. This is a lesson, it seems to me, that people who ask for amnesty have not understood at all, that real strength may lie in being punished and triumphantly accepting it—here is the moment, the cutting edge of the situation, the moment when the community is to be embarrassed by your imprisonment.

WLB Do you see civil disobedience, as King defines it, as a powerful way of changing bad laws?

BENNETT I did then, and yes it still may be, when used sparingly and correctly and in a discriminating fashion. I'm afraid right now we ought to have something like a moratorium on it because the thing has lost its effect; it's been so badly misused by many who didn't satisfy the conditions King mentioned: self-restraint and moral seriousness.

WLB Then it ceases to be civil disobedience, by your definition.

But I still sympathize with the student's feeling that the law is somehow an abstract power, a sort of monolith, a "They," that he just doesn't have any possible influence on. That seems to be the feeling of many of my students.

BENNETT Well, if it's historical evidence of progress that's needed, there are books to read. Or take a look at the last fifty years. You can be given a hundred and fifty important pieces of legislation which have had a profound and positive effect on this society. Do you want individual examples? You can borrow my friend, the welfare lawyer, or my brother, a conscientious trial lawyer. Or borrow some law students. And if the student still sits there and says he wants to think of the law as a monolith, well, okay, he's no longer open to evidence. If the question is whether anything can be done to bring forward new arguments and ideas, the answer is yes, things can be done. But can you as a teacher persuade all your students of the truth of that? The answer is no. Some of your students, I have to believe, will be invincibly stubborn on this point, and there's no evidence in the world that will change them. That's to remind the teacher of something he should have always known: he can't educate all his students. He can only make his best effort.

WLB Let's be more specific. How would you go about presenting a case for the law in a high school classroom?

BENNETT Well, there's a variety of ways it can be done. One way is to start with something current, very topical, something that people are concerned with—something like the right to privacy, or the pornography cases. Talk about a particular case that you read about in the newspaper, and then go and read some other cases that were referred to in the newspaper story so you

get a little something of the history of this particular problem.

Students do a lot of talking about the right of privacy, but can they explain it? You start off by asking, "Where does the law get this notion of the right to privacy anyway?" You give them a specific law case to work with. And you go back and read a little bit of the history of the law of privacy. Now, this might sound very dull, but really the sort of things that have happened aren't dull at all. You could use a number of cases here to show the evolution of the law of privacy in a way in which I think students could be very interested. These days, people talk about the law of privacy and the right to privacy as if it had always existed in the law, but that's not the way it is. It was really about 1900 that this thing started to get some attention in this country.

I've found students really enjoy reading the material relevant to this notion of privacy in the law. One of the important moments came sometime in 1902 when a lady was walking down the street and had her picture taken by somebody. A few weeks later she walked into a grocery store and found new cereal boxes with her picture on them, labeled "So-and-So's Cornflakes." Well, she didn't like the idea of having her picture plastered all over groceries all over the country, so she tried to bring legal action, and the lawyers arguing in her behalf argued that the right to privacy had been violated. This was *Roberson v. Rochester Folding Box Co.* The courts didn't know what to do with the case because they couldn't find much about a right of privacy in the common law tradition of law. Is this a property right? No. Do you have some sort of right in your own person, in your own image? They puzzled about it, and the case inspired a lot of reaction. People started thinking about it, worrying about it.

About two years later, a very similar thing happened, recorded in the case *Pavesich v. New England Life Insurance Company*. In Georgia a man had his picture taken and opened up the newspaper one day and found his picture and a caption saying "So-and-So Did Not Buy His Insurance from Our Company." Next to his picture was the picture of a very young, handsome fellow who had bought insurance, whereas the fellow in question looked bedraggled and not very attractive. Because these pictures were being plastered all over the newspapers all over the country, he felt that a right had been violated. By then, the judges and lawyers, given more time to think about it, decided that there really was a kind of right of privacy, a right which was different from a property right and different from other sorts of personal rights, but by a kind of blending of rights which already existed, one could find a right of privacy.

WLB For example, could you begin with the teacher from Sheboygan, Wisconsin, who was fired and ended up committing suicide because of an invasion of his privacy? That received large media coverage a couple of years ago.

BENNETT You might start there. I'm not familiar with all the facts of that case. But in dealing with any case, if you're talking about the law, the first point you have to make to your students is that a right of privacy simply isn't what those words conjure up in their minds. It's what law has decided on the basis of past decisions are the boundaries of this right. This is why I think the historical inquiry makes sense. Then we begin to see some familiarity with these cases. The point I want to make here is that these cases are interesting, and some are kind of funny, too, in a way.

WLB Historical inquiry seems to suggest the precision of definition that you were talking about before.

BENNETT Yes, that's a really interesting aspect of the law. People say, you know, that the law is basically conservative: it's concerned to conserve what it has already laid down and to make what it has already said operative for the future. And the complexity of the law teaches an important lesson: the law frequently turns to the past, and, interestingly enough, the conservative instinct is quite progressive. That is, you use the past to move forward into the future. Here's this right, say, in the Ninth Amendment or the Fourteenth Amendment, which lies dormant for a number of years and then for the sake of progress, for the sake of the future reform, lawyers turn to this past, to something which was operative a hundred years ago but might have been forgotten, and apply it in this present situation for the sake of future progress.

WLB But they changed the context.

BENNETT The context always changes. This is a way law has always operated. Probably one of the most important moments in the history of law took place in the seventeenth century, when Edward Coke challenged the supremacy of the king in regard to certain matters and said that Englishmen were governed by laws and not by the king, that the king, like other Englishmen, was under God and the law. For his argument he went back to the thirteenth century, back to Magna Carta.

Who are the conservatives here and who are the liberals? Well, it's hard to figure out. The king appears to be the liberal here. Coke treats him as the liberal who's trying to adopt a piece of wild-eyed progressive legislation, or what he thinks is progressive legislation, but Coke puts himself in the posture of a conservative saying we're trying to restrain him in accordance with the

law of the thirteenth century, which says no free man shall be imprisoned without due process of law. That refers to the law's and not to the king's power. So Coke puts himself in the position of being respectable and conservative and saying, "I just want to do what we've always done; I just want to be consistent." He makes the king look as though he's taking liberties that really don't belong to him. This has always been a weapon of the lawyer. These are things students should see.

WLB Last year at our school, we had a course that used the case method to investigate issues like privacy, divorce, and property rights, trying through law to get at the question of authority. Do you think that this type of semester course is the best way of teaching high school seniors about the law?

BENNETT I don't lean toward a course on "law" or "legal rights." I really like the thematic approach. I like the idea of pursuing some issue like "authority" or "citizenship" and then talking about law, say, if your course is two semesters long, for four weeks or six weeks, and within that talking about some other single theme like privacy, which we were just talking about. I like that because I think one thing that we don't do sufficiently in our educational system is show the interdisciplinary character of useful knowledge, show that knowledge is not compartmentalized but that it involves all the disciplines at once. Law is a nice example because it is so interdisciplinary itself, but still I wouldn't want to talk about law and block off all the other kinds of inquiries that might take place.

Therefore, I think, pursuing problems under the theme of something like the question of authority puts in proper perspective the place and function of the law. You see, I'm concerned to talk about the law, but I'm very much concerned to talk about the limits of the law. One way to suggest the limits of the law is to suggest that this is only one of the things that man does, one kind of activity in which he's involved, one kind of expression of who he is, and that there are other kinds of expressions.

I might want to divide any such course into three parts. First, let's say we're going to talk about the authority of the world of nature, the limits nature imposes upon us. Here I might use an ecology theme, which would be a good way to start because the students are interested. What's imposed on us by the facts of biology? By the facts of the world we live in? Raise the concept of limit here, of natural limit. Then I might want to move on to the limits imposed upon us by very essential aspects of our nature. Here I might want to talk about what philosophers, psychologists, theologians, writers have talked about—things like sin, original sin, ego, id, passion, rationality,

irrationality—the limits, the authority, of certain aspects or ingredients of the self. Then, as a third element, I might want to talk about the place of institutions and their authority. This would be a perfectly good place to talk about the law. The reason I'd want to do that is that I don't think the law should be held up here as something totally separate, because it isn't something separate. The limitations of biology have their effects on the law, and the limitations imposed by human nature itself obviously have their implications in law, so all these things pretty much have to be seen together. I think that's a reasonable way to go about it.

WLB Could you extend this course to include the authority of other institutions like the family or the school?

BENNETT "The family" is a really interesting place to start in terms of pursuing these three topics, because the family is tied together by certain biological limitations and conditions. It's also tied together by virtue of certain other aspects of human nature. For example, we talk about the need for nurture from the parent. And the family also has its legal implications and is a legal entity. Family law is one of the most interesting and tantalizing areas of law that there is. Under this, you raise problems about divorce, abortion, and issues like that.

WLB What problems in expertise does this raise? We're talking about a course which talks about natural authority, individual and personal authority, and institutional authority. What kind of expertise are you demanding of teachers?

BENNETT First you recognize that what you're doing in this course is not trying to train people to be biologists or lawyers. What you're trying to do, as a teacher of the humanities, is raise these important questions, these pervasive questions: What sense are we to make of ourselves and the human condition? How do things like institutions and legal processes aid or inhibit self-realization? What limits are imposed upon fulfillment by our biological nature, by law, and by our own egos?

I don't think one needs much more expertise than one's students in this area. Whether you can understand the legal case, the fact that it starts off by saying "Petition by writ of something from appeal by something, etc., etc.," doesn't matter. You can look up the language if you want, but you don't really have to. That's not what we're after. We're after getting people to think more on selected issues, and the development of moral reasoning is more important than the development of a legal vocabulary.

WLB Do lawyers always resort to a legal vocabulary?

BENNETT Yes, lawyers use this strange language a lot of the time. Sometimes it seems as if they're intending not to be understood.

WLB I was just wondering whether this would be a perfect example of an interdisciplinary course; your ecology section might be handled by the science department . . .

BENNETT I don't go along with that. The question, say the question of authority or the question of privacy, is an interdisciplinary question with a lot of features to it. The individual teacher should be concerned with all of them. Otherwise the students will say, "Look, I sit here and listen to all these visitors, but you only pop in occasionally. You're telling me I should be interested in all aspects of it, but aren't you? Why aren't you here all the time?"

I can see calling in someone for a particular lecture, a single shot, or maybe two shots, but I think there's got to be one teacher there, guiding it, to be sure that the course has continuity.

WLB Do you feel that just about every teacher has the confidence and competence to deal with an interdisciplinary course? You may be able to deal with it, but can he?

BENNETT Many can, if they can deal with their students, if there's a degree of trust, if they don't try to fake it, and if they're reasonably competent. One thing the teacher shouldn't do is pose as an expert biologist, a lawyer, and an expert in family relations and make success contingent upon the achievement of that bluff.

WLB But he certainly can make comments about matters outside his discipline.

BENNETT Sure he can. But his question always in the teaching of this humanities course is: Okay, you heard that lecture or you read that book; now what's the significance of it vis-à-vis the question we're asking? That he ought to be able to do.

WLB So you see this idea of the authority of law as just one small part of your course?

BENNETT Yes, because law is just one part of the humanities and of life. It's not very small; it's got its place. I tell my students we're talking about law, and law is important, but it's not the most important thing. Personally, I think the question about what or whom one should worship, if anything, is every bit as important as the question about the right to worship. And once you decide that you live in a society of law, and law is necessary, you still have to decide on the particular shape of your own life. And laws may not be very helpful in that quest.

In some ways, then, law helps people do what they want, live out their lives in the way they want. The best notions of what a society should become or what human life should become really are something the law will not define. The First Amendment in part says, basically, that except in some extreme situations, you can say and think and read and talk about whatever you like, but it doesn't tell you *what* to think. As I have said to my students a number of times, the law may be a necessary condition for good life in society, but it doesn't tell you enough about the individual good life. It doesn't tell you what you should do with that life which it protects. It tells you you have a right to speak freely, but it doesn't tell you what to say. It tells you you have a right to worship, but it doesn't tell you whom or what to worship. And those definitions and those ideas, it seems to me, have to come from our writers, politicians, philosophers, theologians, and even from our lawyers, out of court—but from some place other than the law itself.

Bibliographical Note

As the argument suggests, the best material for introducing students to law is the case law itself. To find suitable cases the teacher should gain the use of a lawyer friend's library or acquaint himself with a law library if there is one nearby. But even these measures are not required in order to gain access to plentiful stores of case material. Many casebooks used in the first year of law school are perfectly adequate and contain much useful material, especially casebooks on torts, contracts, and criminal law. The teachers can buy or borrow used copies and flip through these books to find interesting cases for use in a variety of courses. In addition to such professional compilations there are now many useful paperback collections of law cases designed for the nonprofessional. Several organizations put out useful materials of this sort. The *Law in a Free Society* materials, put out by the organization of the same name in Santa Monica, California, are thoughtful and well organized. Also, materials and sound advice are available from the Special Committee on Youth Education for Citizenship of the American Bar Association in Chicago. Other useful collections of cases in books that should be available from local bookstores are Philip Davis, *Moral Duty and Legal Responsibility* (New York: Appleton-Century-Crofts, 1966; paperback) and a fine collection of cases on constitutional law, Robert E. Cushman, *Leading Constitutional Decisions* (New York: Appleton-Century-Crofts, 1966). If the teacher wishes to begin by examining the cases cited in this conversation, they are *Brown v. Board of Education* 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954); *Miranda v. Arizona* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); *Pavesich v. New England Life Insurance Co.* 122 Ga. 190, 50 S.E. 68 (1905); *Roberson v. Rochester Folding Box Co.* 171 N.Y. 538, 64 N.E. 442 (1902).

For the history and social studies teacher, law cases can frequently high-

light the period under consideration, and the student will find that reading about the thoughts, adventures, and experiences of lawyers in exciting times can prove very interesting. Catherine Drinker Bowen's two excellent studies, one of Sir Edward Coke, *The Lion and the Throne* (Boston: Little, Brown, 1956), and another of Justice Oliver Wendell Holmes, *Yankee From Olympus* (New York: Bantam Books, 1943), are among the best in this category. Both of these books are long, but for the interested student they can be very engaging reading over a Christmas or spring recess. In addition these books can be referred to or read from in part to stimulate general class discussion. Landmark historical cases referred to in these books can be located and copies can be made for the class.

Another excellent source to use when it is available is Zechariah Chaffee's two-volume paperback *Documents on Fundamental Human Rights* (Clinton, Mass.: Atheneum Press, 1952). One hopes for greater availability of this first-rate collection of historical documents, cases, and notes. In the same area of interest, of course, *The Federalist* and the Constitution are essential reading for students of law and society. One can hardly claim to be knowledgeable about the American legal system without some grounding in the documents containing our fundamental law and the philosophy behind it.

Commentaries and essays on law do not in general serve as well as case studies for the student who wants to get a sense of the operation of law and for the teacher who wants to sharpen the moral judgment of his students, but if perspective on law and its place is sought there are a few excellent guides. Paul A. Freund's *The Supreme Court of the United States* (Cleveland: Meridian Books, 1961) contains seven thoughtful essays on the "business, purpose, and performance" of the Court. Freund's *On Law and Justice* (Cambridge, Mass.: Harvard University Press, 1968) considers matters of constitutional law and the theory of justice and also contains several inspiring essays on selected Supreme Court justices. If a book on jurisprudence is sought, Lon Fuller's *The Morality of Law* (New Haven: Yale University Press, 1964) is a good philosophical discussion of the nature of law. It is fairly readable and not too difficult for bright high school students. An excellent introduction to the different subjects of law is *Talks on American Law*, edited by Harold Berman (New York: Vintage Books, 1961). This is a series of lectures on American law for foreign students, but as with the other books this book should be supplemented with some case studies.

Of course, newspapers and magazines contain stories and articles about law cases, the courts, and the legal profession. Such items can be very useful for

beginning an inquiry into law and legal institutions. Also, teachers often are asked about student rights and responsibilities, issues of academic freedom, First Amendment rights in the schools, and other matters that may be at issue in the teacher's own school. The American Civil Liberties Union publishes a number of excellent and helpful booklets as general introductions to the law in these sensitive areas. Teachers should write to The American Civil Liberties Union, 156 Fifth Avenue, New York, New York 10010 for a list of titles.

Finally, in regard to the use of the case material in the classroom, I would only add that the teacher should not hesitate to alter the cases and change the facts if it is appropriate to so shift the focus of inquiry to raise further questions. It is more important to use this material imaginatively and creatively than to always be on guard to be true, pharisaically, to the sometimes technical and obscure presentation an editor or compiler may offer. For a time, the spirit and not the letter of the law will be more than sufficient.

W.J.B.

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